# Supreme Court of the United States

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Petitioner,

*against*

CARL RÖCHLING, *et al.*, trading as GEBRUEDER RÖCHLING,
Respondents.

## BRIEF FOR RESPONDENTS

### I. RESPONDENTS' STATEMENT OF THE CASE.

The appellant's brief correctly states the ground for jurisdiction and the citation of the previous opinions in this case and for this reason these matters are not repeated herein.

The appellant is also correct in stating that there is no dispute of the facts, which are found either in the pleadings or in the stipulation of facts. The respondents desire to add to the statement made by the appellant certain facts appearing in the record that are not cited in the appellant's otherwise correct exposition of the facts.

#### THE NATIONAL BANK OF COMMERCE CHECK.

As appears by reference to the photostatic copy in the record (Exhibit D; R-13) there is printed on the face of

this check, in addition to the words set out in the appellant's brief, the words "Through the New York Clearing House."

## THE NATIONAL CITY BANK CHECK.

As appears by reference to the photostatic copy of the check (Exhibit I; R-15), there is printed on the face of this check, in addition to the words set out in appellant's brief, the words "Payable only through the New York Clearing House."

## SPEYER & CO. CHECK.

On June 15, 1923, a check for $30,000. was received from Speyer & Co. by Knauth, Nachod & Kuhne (known as and frequently referred to herein as K. N. & K.) for the account of Röchling (R-23).

The amount of this check was credited by Knauth, Nachod & Kuhne to the account of Röchling on June 15, 1923 (R-23). After the appointment of a receiver for Knauth, Nachod & Kuhne payment on this check was stopped pursuant to instructions given by Speyer & Co. (R-23). After stoppage of payment on this check the credit to the account of Röchling was reversed and the sum of $30,000. was subtracted from the balance then appearing on the books of Knauth, Nachod & Kuhne to the credit of Röchling (R-23).

## ITEM OF INTEREST.

While it is true, as stated in appellant's brief, that an entry was made on the books of Knauth, Nachod & Kuhne that respondents were entitled to interest on the National Bank of Commerce check and the National City Bank check

on June 15, 1923, it should be added that it was *the receiver*, after the bankruptcy, who in preparing a statement of the account of the respondents with Knauth, Nachod & Kuhne as of the close of business on June 15, 1923, included interest for one day on the National Bank of Commerce and National City Bank checks (R-22). It was also *the receiver* who reversed the credit of the Speyer & Co. check for $30,000. and did not include interest thereon for one day (R-23).

## II. SUMMARY OF RESPONDENTS' ARGUMENT.

*A.* The words "for account of" and those directing payment through the New York Clearing House are restrictive, preventing the bankrupts from obtaining title to the checks or their proceeds prior to the bankruptcy, and entitling the respondents to recover the traced proceeds held by the Trustee in Bankruptcy.

1. Early English authorities decided that the words "for account of" were restrictive.

*Treuttel* v. *Barandon* (1817), 8 Taunt. 100;
*Coxe* v. *Harden* (1803), 4 East 211.
*Lloyd* v. *Sigourney* (1829), 5 Bing. 525.

2. The modern English rule is the same in cases of "crossed cheques".

*The Laws of England,* by Lord Halsbury (1907), Volume 1, page 569; Volume 2, page 480;
*Morse on Banks and Banking* (6th Ed.), Sec. 245.

3. Early American Federal and State cases follow the English rule.

*e. g. Lee* v. *Chillicothe Bank* (1860), 15 Fed. Cas. 151;
*Leary* v. *Blanchard* (1860), 48 Maine 269;
*Blaine* v. *Bourne* (1875), 11 R. I. 119.

4. The words "for account of" held to be restrictive by the United States Supreme Court in the case of *White* v. *Miner's National Bank* (1881), 102 U. S. 658.

5. The statements in the case of *White* v. *The Bank* that the words "for account of" are restrictive, have been regarded as the law of the case by subsequent decisions of the Supreme Court and the lower Federal courts, and the courts of the States.

*e. g. Commercial National Bank* v. *Armstrong* (1892), 148 U. S. 50, 57;

*Old National Bank of Evansville* v. *German American National Bank of Peoria* (1894), 155 U. S. 556, 562;

*The Nyssa-Arcadia Drainage District* v. *The First National Bank* (D. C. D. Oregon) (1925), 3 Fed. (2nd.) 648.

6. The decisions of the Supreme Court of the United States and other jurisdictions establish the proposition that the legal restrictive effect of the words "for account of" and "for collection" are identical.

*e. g. Old National Bank of Evansville* v. *Bank* (1894), *supra;*

*The Nyssa-Arcadia Drainage District* v. *Bank* (1895), *supra;*

*Bank of Metropolis* v. *First National Bank of Jersey City* (C. C. S. D. N. Y.) (1884), 19 Fed. 301.

7. The restrictive effect of the words "for collection" are recognized in practice by the New York Clearing House.

*Paton's Digest of Legal Opinions and Banking Law,* Section 2747.

8. The words "for account of" are restrictive within the definition of the Negotiable Instruments Law of New York.

9. The effect of the restrictive wording was to prevent Knauth, Nachod & Kuhne from obtaining title to the checks or their proceeds.

10. The words "Through the New York Clearing House" and "Payable Only Through the New York Clearing House" are also restrictive.

*B.* Nothing in the dealings of the parties nor in the circumstances surrounding the case in any way changes the legal effect of the wording appearing on the checks.

1. Lloyd's Bank and The Swiss Bank were liable to respondents for any delay in payments that might arise.

2. The reversal of the entries in the case of the Speyer check indicate the equivocal nature of the credit of the check and entries for interest.

3. The crediting of the checks does not affect the restrictive quality of the words appearing thereon.

*National B. & D. Bank* v. *Hubbell*, (1889), 117 N. Y. 384;

*In Re: Jarmulowsky*, (C. C. A. 2nd) (1918) 249 Fed. 319;

*Beal* v. *City of Somerville*, (C. C. A. 1st) (1892) 50 Fed. 647.

4. The entries relating to interest are equally insufficient to change the legal consequences of the wording on the face of the checks.

*Fifth Nat. Bank* v. *Armstrong* (C. C. E. D. Mo.) (1889), 40 Fed. 46;

*Morse on Banks and Banking,* (6th Ed.) Sec. 658 (c).

5. The facts in the present case bring it within the authority of *White* v. *The Bank* and not within the purview of *Burton* v. *United States* (1904), 196 U. S. 283.

## III. ARGUMENT.

**A. The words "for account of" and those directing payment through the New York Clearing House are restrictive, preventing the bankrupts from obtaining the title to the checks or their proceeds prior to the bankruptcy, and entitling the respondents to recover the traced proceeds held by the Trustee in Bankruptcy.**

The subscriptions on the two checks in the present case are as follows:

*National Bank of Commerce Check.*

"Pay to the order of Knauth, Nachod & Kuhne $30,000. *for account* of Röchling Bank, Gebt. Frankfort on Main.

Through New York Clearing House" (Exhibit D, R-13).

*National City Bank of New York Check.*

"Pay to the order of Knauth, Nachod & Kuhne, New York $30,000. *a/c* Gebt. Röchling, Frankfort on Main.

Payable only through New York Clearing House" (Exhibit I; R-15).

The underscored words "for account of" and "a/c" are the ones to which attention is directed. These particular words have undoubtedly been in common use for a very long time and during the course of the past one hundred years frequently have been subjected to judicial interpretation. As a result the legal effect of such phraseology has been clearly defined by a long line of decisions all reaching the same result.

1. Early English Cases.

One of the earliest cases is that of *Treuttel* v. *Barandon* (1817), 8 Taunt. 100, in which the Court of Common Pleas held that an indorsement "pay to J or order *for account* of N" constituted a restrictive indorsement enabling N, the plaintiff, to recover the indorsed bills of exchange in an action of trover, against the defendant, who sought to hold them for a debt due him from J. The Court observed that the indorsement "*for account*" was one that had been known to commerce and law for many years, and had always been regarded as being restrictive in its effect. See also *Coxe* v. *Harden* (1803) 4 East 211; *Lloyd* v. *Sigourney* (1829) 5 Bing. 525.

2. Modern English Rule.

The rule thus early established has persisted in England and has been crystalized under judicial decisions and acts of Parliament in the category known as crossed cheques.

See *Halsbury, Law of England*, Vol. I, p. 569; Vol. II, p. 480;
*Morse on Banks & Banking*, (6th Ed.), Sec. 245;
***Farmers Bank*** v. *Johnson, King & Co.* (1910) 134 Ga. 486.

Appellant lays stress on the rule enunciated by the House of Lords in 1858 in the case of *Foley* v. *Hill* (1858) 2 H. L. 28 that the relation between depositor and bank is ordinarily that of debtor and creditor. This is all very well, provided it is recognized that there is an equally clear rule known from before 1817 until today, that restrictive wordings on commercial paper establish something in the nature of an agency between depositor and bank. The two rules are parallel and do not conflict with each other. But the rule of *Foley* v. *Hill* has no application to the case at bar, whereas the other rule controls it.

3. Early American Federal and State Decisions.

Apparently a case did not arise in the United States until about 1860. But in that year the Circuit Court for the Southern District of Ohio examined the question in the case of *Lee* v. *Chillicothe Branch of State Bank*, 15 Fed. Cas. 151. Mr. Justice McLean of the Supreme Court sitting as Circuit Judge there held that an indorsement on a bill of exchange reading "*credit my account*" was restrictive. He held that the particular indorsement belonged in the same category with such indorsements as: "*Pay to A for my account*", "*Pay to AB for the use of CD,*" which the Court described as admittedly restrictive.

The Supreme Court of Maine in the same year, in the case of *Leary* v. *Blanchard*, 48 Me. 269, held that the indorsement "pay to A *for the account* of payee" was restrictive.

In 1875 the Supreme Court of Rhode Island in the case of *Blaine* v. *Bourne*, 11 R. I. 119, decided that the indorsement, "Pay JC or order *for account of B,*" constituted a

restrictive indorsement, preventing JC from obtaining title to the instrument.

4. The decision of the Supreme Court in the case of White *v.* Miners Nat. Bank.

It will thus be seen that when the question first came before the Supreme Court in 1881, there already existed a body of authority in this country and in England, which had uniformly decided that the words "*for account of*" or variations of such words, were restrictive in their effect.

In the case of *White* v. *Miners Nat. Bank* (1881) 102 U. S. 658, the plaintiff purchased a draft indorsed as follows: "Pay S. V. White or order *for account* Miners National Bank, Georgetown, Col." The draft was not paid at maturity and White sued.

It was contended that the words of indorsement were merely explanatory and that White actually had title to the check. It was further argued that a custom in the City of New York entitled him to payment notwithstanding the effect that might otherwise be given to the particular wording. These contentions were disposed of by Mr. Justice Miller, writing the opinion for the Court, as follows:

> "We are not satisfied that either of these propositions is sound.
>
> The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay to the indorsee, for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary

> meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make Mr. White the agent of the Bank for the collection of the money."

Continuing the court examined the contention that there was a question of mutual mistake in the case which should have been left to the jury. The thirteenth instruction asked by the plaintiff and refused by the court properly raised this issue. The Supreme Court held that this was error and sent the case back to the lower court.

Mr. Justice Miller says that,—

> * * * "There is evidence that neither White nor Brownell noticed the restrictive words of the indorsement."

This being so the court says that if the judge below was right in holding the indorsements restrictive the question of mutual mistake was properly raised. In sending the case back under these circumstances the court of necessity was bound to consider whether the judge in construing the words as restrictive in their legal effect, was guilty of a misstatement of the law. If he was, it is inconceivable that they should not have corrected it. The fact is that far from correcting it, they allowed his statement to stand but said that on his statement the question of mutual mistake of the parties was a question that the jury should pass upon.

The appellant seeks to distinguish the *White* case and all others related to it by stating in his brief that they relate to a case of an indorser indorsing to the indorsee for the indorser's benefit.

In the case at bar the appellant argues that the rights are those of the indorsee and a third party. The appellant also argues that in the *White* case and others the indorser, for whose account the indorsement was made, does not appear to have an account with the indorsee.

These attempted distinctions are without merit. The very earliest authorities cited, and the case of *Treuttel* v. *Barandon*, from which the others, including the *White* case have stemmed, are cases where the rights of a third party other than the indorser, are protected by a restrictive indorsement.

The only difference in legal effect between the case where the indorsee bank has no account for the indorser and where it has, is that in the former case the title to the funds after collection remain in the indorser. But when the indorser has an account with the indorsee, then after collection the indorsee mingles the proceeds of the other funds and the debtor-creditor relationship comes into being.

But even under the appellant's own distinction the *White* case must be regarded as fully controlling. The absence of an account, which is the point of distinction, is found here. In the present case the National Bank of Commerce and the National City Bank of New York, who are the indorsers, did not have a general account with Knauth, Nachod & Kuhne, who are the indorsees.

5. Interpretation of the *White* case by subsequent decisions.

An examination of subsequent authorities that refer to the *White* case makes it perfectly clear that the foregoing

quotation has ever since been regarded as the law of the case.

See *Daniels (6th Ed.) Negotiable Instruments,* Sec. 698-A.

In 1892 the Supreme Court had to pass on the question of the effect of an indorsement reading "Pay Fidelity *for collection* for Commercial Bank," in the case of *Commercial National Bank* v. *Armstrong,* 148 U. S. 50, 57, (s.c.) 39 Fed. 684, 690. The court held that these words constituted a restrictive indorsement, citing as its first authority the case of *Sweeney* v. *Easter* (1863) 68 U. S. 166, wherein the opinion was written by Judge Miller, who also wrote the opinion in the *White* case. Continuing, the court said:

> "And in *White* v. *Miners National Bank of Georgetown,* 106 U. S. 658, where the indorsement was 'for account,' the same justice, speaking of the indorsement, said:
>
> 'It does not purport to transfer the title of the paper or the ownership of the money when received.'
>
> The plaintiff then, as principal, could unquestionably have controlled the paper at any time before its payment, and this control extended to such time as the money was received by its agent, the Fidelity." Citing *National Butchers & D. Bank* v. *Hubbell,* 117 N. Y. 384 (discussed hereafter).

Three years later, in the case of *Old National Bank of Evansville* v. *German American National Bank of Peoria,* (1894) 155 U. S. 556, 562, the Supreme Court again cited the *White* case as its authority on the question of restrictive indorsements.

Without extended comment reference is made to the following cases, all of which specifically refer to and rely upon

the *White* case as their authority in deciding that the words "*for account of*" or similar expressions are restrictive.

In re *Armstrong* (C. C. S. D. Ohio W. D.) (1888), 33 Fed. 405;

*Fifth National Bank* v. *Armstrong* (C. C. E. D. Mo. E. D.) (1889), 40 Fed. 46;

*First National Bank* v. *Armstrong* (C. C. S. D. Ohio W. D.) (1890), 42 Fed. 193;

*Beal* v. *Somerville* (C. C. A. 1st) (1892), 50 Fed. 647;

*U. S.* v. *American Exchange National Bank* (D. C. S. D. N. Y.) (1895), 70 Fed. 232.

See also:

*National Butchers and Drovers' Bank* v. *Hubbell* (1889), 117 N. Y. 384; and

In re *Jarmulowsky* (C. C. A. 2nd), (1918), 249 Fed. 319, fully discussed, *infra.*

The latest case which has examined the authority of the *White* case is *Nyssa-Arcadia Drainage District* v. *The First National Bank* (D. C. D. Ore.) (1925), 3 Fed. (2d) 648, in which Judge Wolverton states the holding therein as follows:

> "Nor does indorsement 'for account' purport to transfer the title of the paper or the ownership of the money when received. *White* v. *National Bank.*"

Other jurisdictions, often relying upon the *White* case, have arrived at the same result, in deciding that the words "*for account of*" or "*for collection*" are restrictive in their effect, preventing the passage of title to the paper or its proceeds.

*First National Bank of Belmont* v. *First National Bank* (1898), 58 Ohio State, 207;
*Freiberg* v. *Stoddard* (1894), 161 Pa. 259;
*Hackett* v. *Reynolds Lamberton Co.* (1886), 114 Pa. 328;
*First National Bank of Clarion* v. *Gregg & Co.* (1875), 79 Pa. 384;
*Bank of Sherman* v. *Weiss* (1887), 67 Texas 331;
*Freemans National Bank* v. *National Tube Works Co.* (1890), 151 Mass. 413.

See also:

*Manufacturers Nat. Bank* v. *Continental Bank* (1889), 148 Mass. 553;
*Daniels on Negotiable Instruments* (6th Ed.), 698 (A).

A striking point in all of the foregoing cases is the complete unanimity reached by the different courts. It frequently happens that with the great expansion of banking and the growing use of negotiable instruments many of the earlier decisions are found to conflict with those decided under changed and more modern circumstances. Not so here. The rule announced in 1817 has been adhered to without dissent.

6. THERE IS NO DIFFERENCE IN THE RESTRICTIVE EFFECT BETWEEN THE WORDS "FOR ACCOUNT OF" AND "FOR COLLECTION."

There can be no doubt that the effect of the words "*for collection*" on negotiable paper is restrictive. *Daniels on Negotiable Instruments* (6th Ed.), Sec. 698 (5). This was decided by the Supreme Court in the case of *Sweeney* v. *Easter* (1863), 68 U. S. 166, in which the opinion was written by Mr. Justice Miller, who wrote the opinion in the

*White* case as well. The decision thus reached has been uniformly followed by the Federal cases, *Old National Bank of Evanville* v. *Bank* (1894), *supra; Nyssa-Arcadia Drainage District* v. *Bank* (1925), *supra.* A late New York authority reaffirming this rule is *Bank of America* v. *Waydell* (1907), 187 N. Y. 115.

A corollary to this main proposition is the identical restrictive effect given by courts to the words "*for collection*" and "*for account of.*" Cases dealing with one phrase refer for their authority to those dealing with the other.

In *Commercial National Bank* v. *Armstrong,* 148 U. S. 50, 57, the Supreme Court considered the question of the status of commercial paper forwarded by one bank to another and indorsed "*for collection.*" In deciding that these words there were restrictive and that the collecting bank obtained no title to the paper or proceeds, the court not only followed the ruling in *Sweeney* v. *Easter, supra,* but relied equally upon the decision in the *White* case. A reading of the decision leaves no doubt that the court was of the opinion that the restrictive effect of the words "*for account of*" and "*for collection*" was the same.

The same conclusion is supported by the later case of *Old National Bank of Evansville* v. *The German National Bank of Peoria,* 155 U. S. 562.

To the same effect see *Freemans National Bank* v. *National Tube Works Co.,* 151 Mass. 413.

In the case of *Bank of Metropolis* v. *First National Bank of Jersey City* (C. C. S. D. N. Y.) (1884), 19 Fed. 301, the court decided that the words "*for collection*" were restrictive. In the course of the opinion, Judge Wallace said:

"But the checks bore the indorsement of the plaintiff in a restricted form, signifying that the plaintiff had never parted with its title to them. In the terse statement of Gibson, C. J., 'a negotiable bill or note is a courier without luggage; a memorandum to control it, though indorsed upon it, would be incorporated with it, and destroy it.' *Overton* v. *Tyler,* 3 Pa. St. 348. The indorsement by plaintiff 'for collection' was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds, to another. As was held in *Cecil Bank* v. *Bank of Maryland,* 22 Md. 148, the legal import and effect of such indorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark bank was merely its agent for collection. In *First Nat. Bank* v. *Reno Co. Bank,* 3 Fed. Rep. 257, paper was indorsed, 'Pay to the order of Hetherington & Co., on account of First National Bank, Chicago,' and it was held to be such a restrictive indorsement as to charge subsequent holders with notice that the indorser had not transferred title to the paper, or its proceeds. Under either form of indorsement the natural and reasonable implication to all persons dealing with the paper would seem to be that the owner has authorized the indorsee to collect it for the owner, and conferred upon him a qualified title for this purpose and for no other. Other authorities in support of this conclusion are *Sweeney* v. *Easter,* 1 Wall 166; *White* v. *Nat. Bank,* 102 U. S. 658; *Lee* v. *Chillicothe Bank,* 1 Bond 389; *Blaine* v. *Bourne,* 11 R. I. 119; *Claflin* v. *Wilson,* 51 Iowa 15."

A reading of the following authorities (also cited under Par. 5) emphasizes this identity of the words "*for collec-*

*tion*" and "*for account of.*" All of these cases, as stated, rely specifically upon the *White* case as their authority, the courts in some instances passing upon the words "*for collection*" in others "*for account of*" with, however, a complete unanimity of opinion that such phrases are equally and interchangeably restrictive.

*In re Armstrong* (C. C. S. D. Ohio W. D.) (1888), 33 Fed. 405, "Pay Federal Bank or order *for collection for account of W.*";

*Fifth National Bank* v. *Armstrong* (C. C. E. D. Mo. E. D.) (1889), 40 Fed. 46, "Pay X *for collection of A.*";

*First National Bank* v. *Armstrong* (C. C. S. D. Ohio, W. D.) (1890), 42 Fed. 193;

*Beal* v. *Somerville* (C. C. A. 1st) (1892), 50 Fed. 647;

*U. S.* v. *American Exchange National Bank* D. C. S. D. N. Y.) (1895), 70 Fed. 232, "*for collection.*"

7. Recognition of the rule in the *White* case by the New York Clearing House.

The holding in the *White* case and similar decisions, has received practical recognition by the New York Clearing House. This is made clear by reference to *Paton's Digest of Legal Opinions and Banking Laws.* Mr. Paton is general counsel for the American Bankers Association and his views necessarily reflect a wide experience and intimate knowledge of this branch of the law. In Section 2747 of his work, he says:—

"Section 8 of Article 10 of the Constitution of the New York Clearing House Association reads as follows:—

> *'The members shall not send through the Exchange any checks, drafts, notes, bills of exchange or other items having thereon any qualified or restricted indorsement such as "for collection" or "for account of", or "pay any bank or banker or order", or other similar indorsements unless all indorsements thereon are guaranteed by the members of the association sending such items through the Exchange.'*

* * * * * *

The quoted provision of the Constitution of the New York Clearing House follows the decisions by the New York courts to the effect that where a check was raised or the indorsement forged and the item was indorsed to a bank for collection, the indorsee, appearing as agent only, was not responsible to the payor after it had paid over the proceeds to the principal." (Italics ours.)

See also:

*First National Bank of Belmont* v. *First National Bank* (1898), 58 Ohio State 207.

8. THE WORDS "FOR ACCOUNT OF" ARE RESTRICTIVE IN THE SENSE DEFINED BY THE NEGOTIABLE INSTRUMENTS LAW.

The following definition of a restrictive indorsement is found in Section 66 of the Negotiable Instruments Law of New York:

> "An indorsement is restrictive, which either:
>
> (3) Vests the title in the indorsee in trust for or to the use of some other person."

In the case at bar the writing on the checks directs that money is to be paid to K. N. & K. not for their own account but for account of Gebr. Röchling. Clearly under the Statute above cited, K. N. & K. hold title to the check "in trust for or to the use of" Gebr. Röchling.

9. THE EFFECT OF THE RESTRICTIVE WORDING WAS TO PREVENT KNAUTH, NACHOD & KUHNE OBTAINING TITLE TO THE CHECKS OR THEIR PROCEEDS.

Generally stated the effect of a restrictive indorsement or wording on negotiable paper is to prevent the indorsee from obtaining any title to it or its proceeds, except such title as is sufficient to collect the proceeds for the person in whose favor the indorsement runs.

The result is that where the paper has not been collected it may be recovered by the true owner. So in *Treuttel* v. *Barandon, supra,* where the indorsement was "Pay to J. or order *for account of* N" the court allowed N to recover in an action of trover against the defendant who sought to hold the paper for a debt due him from J. Again in *Blaine* v. *Bourne, supra,* the indorsement "Pay JC or order *for account of* B" was held to give no title in the instrument to JC.

In the *White* case the plaintiff *White* unsuccessfully sought to recover the proceeds of the draft for himself.

The rights of the true owner of paper indorsed *"for collection"* to recover the proceeds forwarded by a subagent bank to the collecting bank after bankruptcy is established in *Commercial National Bank* v. *Armstrong, supra; Bank of Metropolis* v. *First National Bank of Jersey City, supra.*

The other authorities cited are to the same effect.

In the instant case K. N. & K. received the checks before insolvency, but collection thereof was not effected until after the appointment of a receiver on June 16, 1923, and the proceeds came into the possession of the trustee in bankruptcy at a still later date. Under the authorities above cited it is submitted that the right of respondents to reclaim the proceeds traced into the possession of the trustee is clearly established.

10. THE WORDS "THROUGH THE NEW YORK CLEARING HOUSE" AND "PAYABLE ONLY THROUGH THE NEW YORK CLEARING HOUSE" ARE ALSO RESTRICTIVE.

On the face of the National Bank of Commerce check appears the words "Through the New York Clearing House" and on the National City Bank of New York check "Payable only through the New York Clearing House."

It is a well known fact of which the Court will take judicial notice that checks delivered on one day payable through the New York Clearing House are in fact not paid through that agency until the day following. That this was the fact in the instant case is evidenced by a stamp appearing on the back of the checks reciting "Received payment through New York Clearing House June 16, 1923,"—that is after a receiver had been appointed.

In the words of *Morse on Banks and Banking* (6th Ed.), Section 245, "there is no question but that the drawer could embody in his order a direction to his bank to pay only upon presentation of the instrument in the usual course through the Clearing House and such a direction would be as valid and binding upon the bank as a direction to pay only to the order of a particular person."

In the case of *Farmers Bank* v. *Johnson King & Co.* (1910), 134 Ga. 486 an analogous situation was presented. The check in that case bore on its face a note that it was payable only at a particular bank in a particular town. The plaintiff sought to obtain payment elsewhere, which was refused. Suit was commenced on the check and the court in an opinion by Judge Lumpkin held that the plaintiff was not entitled to recover because the direction to pay at a particular bank was an integral part of the instrument relieving the defendant from liability unless this direction was strictly complied with.

A somewhat different situation is presented in the case of *Bank* v. *Bank* (1896), 118 N. C. 783. On the face of the check in that case there was printed a stipulation that it would not be paid to the X Company or its agents. It appeared that one of the agents of the X Company had presented the check, payment of which had been refused. The court held that the stipulation was a valid restriction and binding on the holder. The court likened the case to the situation presented by the British crossed cheques.

On this point the following quotations from *Paton's Digest of Opinions and Banking Law* support the contention herein urged.

> "Section 1423:
>
> Notation on check making it 'payable through Bank A' *cannot be disregarded or changed by custom'*. (Italics ours.)
>
> Section 1424: COLLECTION OF CHECKS 'PAYABLE AT PAR THROUGH NEW YORK CLEARING HOUSE'.
>
> It has been held by the courts that where a check has printed thereon a clause making it payable through a designated agency or channel of collection,

> if the check is presented through another agency the bank is justified in refusing payments.' "

In the case of *Third Bank* v. *Clark* (1877), 23 Minn. 263, there was a check endorsed "Pay X Company for collection for M Company". These words were commented on by the court as follows:—

> "An indorsement must be in writing. There can be no such thing as an indorsement wholly or partly in parol. The indorsement in the case is, in fact, restrictive and for that reason cannot be, nor be shown to be, absolute. What the indorser and indorsee *may believe intended by the indorsement, except so far as it is expressed in the writing, is of no consequence to this action.*" (Italics ours.)

The last portion of the foregoing quotation, which echoes in different words the quotation from the *White* case given above, is an apt answer to the appellant's strenuous efforts to nullify the words used, by inferences drawn from the acts of the parties.

In the present case K. N. & K. could not have insisted that the issuing bank, The National Bank of Commerce, or The National City Bank of New York pay the checks except through the New York Clearing House. As above explained this could not be accomplished on June 15th. Under the authority above recited the refusal of the issuing banks to pay except in due course through the Clearing House would not have furnished grounds for a suit by K. N. & K. More than that K. N. & K. would have been justified in resisting any demand that the checks be paid other than in the manner required by the directions on the face thereof.

Looking then to the wording on the checks there can be no doubt that by their tenor it was impossible in law,

as it proved to be in fact, to obtain the proceeds of the check until after the bankruptcy intervened. The only title that K. N. & K. had was title to collect the proceeds and as these did not come to its possession until after the appointment of a receiver they must be regarded as the property of respondents, provided, as is the case here, that they can be traced into the possession of the trustee in bankruptcy.

**B. Nothing in the dealings of the parties nor in the circumstances surrounding the case in any way change the legal effect of the wording appearing on the checks.**

As the Court states in *White* v. *The Bank,* the language on the face of the checks here "is without ambiguity and needs no explanation, either by parol proof or by resort to usage." Only one thing, therefore, can nullify the effect of the restrictive wording and that is the establishment of an agreement, express or implied, the essence of which shall be an obligation on the part of K. N. & K. and Röchling to disregard the plain meaning of the language employed. Admittedly there is no express agreement and it is submitted that there is no agreement to be implied from the facts surrounding the particular checks or the past course of dealing between the parties.

The particular checks were placed to the credit of Röchling on the books of K. N. & K. After the bankruptcy the receiver allowed a day's interest on these checks. The act of the receiver cannot better his position and this crediting of interest must be regarded as simply a carrying on of what the receiver believed had been done prior to the bankruptcy.

1. Liability of Lloyd's Bank and the Swiss Bank.

Prior to the bankruptcy interest had been allowed from the date of receipt by K. N. & K. of checks delivered under circumstances similar to those here.

But what were those similar circumstances under which credits were made and interest allowed on the books of K. N. & K.? (R. 12, 13, 15, 19, 20.) It is in evidence that it was in cases where Röchling had bought from some third person dollar exchange in advance,—that is to say, Röchling had contracted to buy from X Bank dollars at an agreed rate of exchange, payable at a certain future date. These dollars, it was the duty of X to deliver to Röchling on that certain future date at K. N. & K., New York. If delivery was not made on that date Röchling looked to X, not to K. N. & K., for the loss of interest, plus any other provable damage. Again, if payments on the checks were stopped it would be to X, not to K. N. & K., that Röchling would look. Under no possible angle of these circumstances is there any evidence to show that Röchling substituted the obligation of K. N. & K. for the obligation of X. The obligation of X continued.

Under the evidence in the case the fact that Röchling was contracting with the X Bank or banks in all its dealings was something of which K. N. & K. had knowledge or were chargeable with knowledge, since it is admitted that in the other cases beside those of the two checks, the circumstances being the same, K. N. & K. must have signed receipts which by their terms put them on notice that the checks were delivered by some one other than the respondents or their agent.

In short, K. N. & K. were always aware that the X Bank was under a contractual obligation to Röchling if the

X Bank failed to deliver by some particular day a certain sum of dollars at K. N. & K. Failure to so deliver, resulting in loss of interest, would therefore constitute a breach of contract for which the X Bank would be liable. Under these circumstances K. N. & K. was in an excellent position to credit the checks when received and to allow interest from date thereof, well knowing that whatever might subsequently happen by reason of stoppage of payment or failure to deliver at a proper and previously agreed date, Röchling would have recourse to the X Bank. Thus K. N. & K.'s actions were nothing more than the granting of gratuitous favors, acceptable, no doubt, to Röchling, but favors none the less, since in the event of loss the obligation to make good rested not on K. N. & K., but on some other person.

In the present case had Lloyd's Bank failed to live up to its obligation on June 15, 1923, assuming for the moment that the bankruptcy had not occurred it would be to Lloyd's Bank that Röchling would look. If the check sent at the instigation of Lloyd's Bank had not been delivered on the fifteenth, or if after delivery payment thereon had been stopped, the loss of interest and damages would have to be sought by Röchling from Lloyd's Bank, not from K. N. & K.

Suppose that the suit here was by Röchling against K. N. & K. for one day's interest on the two checks delivered on June 15th. Would not K. N. & K. say that there was no obligation on their part with relation to these $60,000 which Röchling desired to have in its account on June 15th? K. N. & K. could well say that the agreement with regard to these sums had been entered into independently by Röchling with some third person; that the obligation of that third person was of no concern to K. N. & K. and the fact

that K. N. & K. in times past under similar circumstances had allowed interest, did not obligate them in any way to do so in future.

2. The Speyer check.

But the crediting on the date of receipt by K. N. & K. and the allowance of interest does not give the full picture. It is in evidence that in the case of the Speyer check for $30,000 which was delivered on June 15th and credited to the account of K. N. & K., credit therefor was reversed when subsequently payment on the check was stopped (R-23). In reversing this entry it is not suggested that the receiver was acting because of any favored position granted him by law or that he was acting otherwise than in accordance with the procedure that K. N. & K. would have adopted if the bankruptcy had not intervened.

The uniqueness of the incident of the Speyer check is to be explained simply by the financial stability of the banks involved. As long as solvent banks sent checks that were invariably honored, K. N. & K. suffered no loss by making the credit entry and by allowing interest from the date of receipt since at all times both entries could be reversed and interest, if advanced, charged back against Röchling, if for any reason the checks from the usually solvent banks were not paid.

It is important in considering this phase of the case to remember that the checks in question here were not delivered to K. N. & K. by a depositor or its agent. They were delivered by a third person who, by reason of obligations owed to Röchling, attempted to discharge the same by delivering the checks in question through K. N. & K. This

fact, to which reference will be made later, distinguishes the present case from others where the facts disclose that the controversy involves a depositor and his own bank.

3. THE FORCE OF THE RESTRICTIVE WORDING IS NOT AFFECTED BY THE CREDITING OF THE CHECKS.

The conclusion that the facts in the present case do not alter the legal effect of the words appearing on the face thereof, is fully supported by the authorities. As will be seen, the same facts or simliar circumstances have unsuccessfully been urged heretofore in an effort to nullify the effect of the writing employed on checks or other negotiable instruments.

In the *White* case the court was asked to disregard the indorsement by reason of an alleged custom of bankers in the City of New York. The court, in its decision, accepted the suggestion of the existence of such a custom. Nevertheless, the court refused to allow this to override the plain meaning of the indorsement. This, of course, goes very far, in that it involves the question of custom, which by legal interpretation supposes a uniform practice generally adopted in a particular community, notorious in its use for a period of time, and known or presumed to be known by the parties to the particular case. And yet the court insisted that the writing must prevail.

It is pertinent at this point to revert to the case of *Third Bank* v. *Clark, supra,* where the court says:

> "What the indorser or indorsee may believe intended by the indorsement, except so far as it is expressed in writing, is of no consequence to this action."

Nevertheless the appellant's brief stresses the importance of examining the circumstances to determine the meaning of the words on the checks. There are limitations to the rule well expressed in the *White* case, in the quotation just made, and in many if not all of the authorities cited by the appellant.

But let us accept for the moment the appellant's thesis. What is the most significant fact surrounding the checks in this case? It is that two large and reputable New York banks, no doubt duly protected by the advice of competent counsel, chose words that for over a hundred years had been construed by the courts of England and America as being restrictive. No case has been adduced where the opposite result has been reached.

It is not a reasonable inference that these banks intended to have a different legal result by their use of these words than the one which had uniformly and repeatedly been given to them by the Courts.

If we shift our point of view to the respondents and the bankrupts the result is the same. They too, as reputable bankers in Germany and in the United States, dealing in New York, cannot be deemed to have used words to mean something diametrically opposite in effect from what those words had always been construed to mean.

The only answer that is suggested in the appellant's brief is the suggestion that the use of the words "for account" was the only way K. N. & K. would know where to deposit the check or its proceeds. But that answer is no answer at all. The result might readily have been achieved in a variety of ways without involving the patent results

that must flow if the words were inserted on the face of the check. For example, the check might have been drawn to K. N. & K. without qualification. Accompanying the check, in duplicate receipt form or otherwise, there might have been a paper reading in substance as follows:

> The accompanying check to your order is for the account of Gebr. Röchling in accordance with instructions received by us. But this information is directive only and is in no way to be construed as limiting the negotiability of the accompanying check nor as making you an agent for collection.

The method suggested is simply an adaptation of the practice instituted after the case of *Burton* v. *U. S.*, 196 U. S. 283, on which the appellant relies so strongly. After this case, holding that where depositors deposited checks to their order with banks where they had accounts, and the bank forthwith credited the same, the banks became owners thereof (subject to the right to charge back hereafter discussed), many banks had their bank books inscribed with a statement that checks were received but were credited only after collection. This practice appears in *In re Jarmulowsky*, 249 Fed. 319, more fully discussed hereafter.

A case that is markedly similar to the one at bar is *National B. & D. Bank* v. *Hubbell* (1889), 117 N. Y. 384. In that case the plaintiff bank, "*for a number of years* had been accustomed to forward to the firm of Wilkinson & Co. for collection, checks, drafts and notes, owing to plaintiff and made payable at different places in Syracuse, Wilkinson & Co. being correspondents of the plaintiff." The plaintiff,

upon receiving checks, etc., payable at Syracuse, indorsed them as follows:

> "Pay Wilkinson & Co., or order for coll., for account of National Butchers & Drovers Bank of the City of New York.
>
> W. H. Chase,
> Cashier."

The checks so indorsed were then forwarded under a covering letter reading as follows:

> "National Butchers & Drovers Bank.
> New York, 188 .
>
> Messrs. Wilkinson & Co.
>
> Dear Sirs:—
>
> Your favor of the inst. is received with enclosures as stated. I enclose for collection and credit bills as stated below.
>
> Respectfully yours,
>
> William H. Chase,
> Cashier."

The items so forwarded were charged on the books of the plaintiff against Wilkinson & Co. on the day on which they were sent.

> "On Thursday of each week Wilkinson remitted to the plaintiff, by a draft on New York, the amount standing to the credit of the plaintiff upon their books up to that time, less about three-sixteenths of one per cent. for their services. These remittances were generally made in the morning, *regardless of whether Wilkinson & Co. had at the time actually received the proceeds of all the checks, drafts, etc., which then*

*stood upon its book credited to the plaintiff. This manner of doing business had been carried on for a number of years prior to the failure of Wilkinson & Co., and was understood by the plaintiff and was the existing arrangement.*" (Italics ours.)

Wilkinson & Co. made a general assignment for the benefit of creditors. The defendant assignee took control. The books showed certain sums credited to plaintiff's account which were actually received after the defendant had taken control. The amounts so received were paid out in good faith to the creditors of the firm and the action was brought by the plaintiff to recover the sum in question on the theory that title thereto had never passed to Wilkinson & Co. and, therefore, there was no title thereto in the defendant assignee.

The Court held that the indorsement passed no title and that Wilkinson & Co. "became simply the agent of the plaintiff to present the paper, demand payment thereof and remit to it."

The Court has this to say about the effect of the letter. That it "amounted simply to a direction to credit after the collection was made, and up to the time that the funds were actually received by the firm it certainly would make no alteration in the law relative to indorsements for collection only."

But here again as opposed to the meaning of the restrictive wording, there was interposed the plea that the course of dealing extending "for a number of years" prior to the general assignment altered the situation. On this point the opinion of Judge Peckham reads as follows:

> "Nor does the finding of the learned justice at Special Term as to the custom pursued between the

> parties alter the law in regard to the title to the paper before the funds arising from the payment thereof were actually received by the firm. The finding shows that the credit was a provisional one only. It was a mere matter of bookkeeping. It would seem to have been more in the form of a memorandum of the different pieces of paper received; because if any were not paid, such as went to protest were at once charged back upon the books of the firm against the plaintiff, and returned to it with the expenses of protest charged to it. The firm never became absolutely responsible to the plaintiff for the amount of these collections until the collections were actually made and the proceeds received by them."

The case is particularly apt to the facts in the case at bar. There is the same limitation of wording, the same continuation of a course of dealing urged to be at variance with the meaning of the particular wording. Nevertheless the court holds that the forwarding bank did not lose title and become a mere creditor of the collecting bank.

But there is one marked point of difference. In the *Hubbell* case the court is dealing with a restrictive indorsement placed on the check by the depositor in a case where the depositor is suing his own bank. In the instant case it is not the check of the depositor but of a third person. If notwithstanding in the *Hubbell* case it was held that a course of dealing did not alter the meaning of the wording between depositor and bank, *a fortiori* would the same conclusion apply with respect to the checks of third persons, presented in the case at bar.

The facts and the holding of the case *In re Jarmulowsky*, (C. C. A. 2nd) (1918) 249 Fed. 319, are important. In that case the reclaimants deposited checks the day prior to the

bankruptcy, some drawn on out of town banks and others drawn on banks in New York. "Both depositors indorsed their checks in blank and received credit (i. e. the checks were not entered 'short') in the passbook for the face of the checks and both their passbooks contained the following notice: 'deposits of currency or coin may be drawn against after deposit, but deposits of checks shall not be drawn against until collected.' "

The receiver introduced evidence that one of the reclaimants had a so-called commercial account with Jarmulowsky "and that as a depositor of that kind he had been permitted to draw against uncollected checks, notwithstanding the passbook entries aforesaid." The Court held that no title passed to the bank. The fact of entry of full credit on the reclaimant's books and the indorsement in blank were not sufficient to establish title in the bank. The right of one of the reclaimants to draw immediately was disposed of by the Court in the following language:

> "Nor do we think the privilege said to have been extended to 'commercial' depositors like Bortz affords any guide to decision. It was a privilege, a favor, without consideration; it could have been retracted at any time, and cannot, therefore, be held to show any change in the legal relation assumed by the parties when petitioners became depositors in bankrupt's institution."

The right of the bank to charge back items originally credited was commented on as follows:

> * * * "The right to summarily charge back uncollected items even after full apparent credit on deposit, is thought inconsistent with any intent on the bank's part to become the owner of such items as those under consideration."

In conclusion the Court said that the course of dealings leads to the same result as if the checks had been indorsed "'for collection and deposit to the account' of the depositors."

The *Jarmulowsky* case goes farther than the *Hubbell* case. In the *Jarmulowsky* case we have a depositor indorsing the checks in blank to a bank with which he has an account, a credit entry immediately on the books of the bank and the right to check against it by one of the so-called depositors. Nevertheless the Court held that the depositor could reclaim.

The *Jarmulowsky* case quotes with approval the case of *Beal* v. *City of Somerville* (C. C. A. 1st) (1892), 50 Fed. 647. In that case the facts were as follows: A City Treasurer had for several years made deposits with the defendant bank without any special agreement. The checks when deposited were immediately credited to the City's account although there was no understanding to that effect. This immediate crediting was known to the City Treasurer. The custom was, in the case of the defendant bank and others in Boston, to allow depositors in some instances to draw their checks before checks deposited had been collected, and in some cases not.

After the bankruptcy the reclamation suit was brought for the proceeds of checks, all deposited and all indorsed "*for deposit.*" The Court upheld the right to reclaim. Judge Putnam stated that the immediate credit on the passbook "was a mere matter of convenience" and did not pass title to the bank. The Court insisted that the bank had failed to show that the plaintiff, the City, had an absolute right to check against the deposit "and that such right did not exist must be received by this Court as a matter of judicial knowledge."

4. Entries Relating to Interest.

In *Fifth National Bank* v. *Armstrong* (C. C. E. D. Mo.) (1889), 40 Fed. 46, the claimant bank sent to the Federal Bank a sight draft drawn on a third party indorsed "pay Federal Bank or order *for collection.*" It was the practice of the Federal Bank in its dealings with the claimant to credit the latter on the day of receipt for all drafts, checks, etc., payable at sight or on demand, *and the balance thus created was subject to be drawn on, and interest allowed on checks thus credited,* but if the paper was not paid it was charged back to the claimant. In the particular case, on receipt of the draft in question, the Federal Bank notified the claimant that it had been credited with the amount drawn, subject to payment, but the credit was not drawn against, nor were advances made on the faith of it. The Federal Bank sent a draft to its agent indorsed "for collection," and the amount of it was counted as a part of the Federal's reserve fund, though this fact was not known to the claimant. The court held that the indorsement was restrictive, that the Federal Bank acquired no title and that upon Federal's insolvency before notification of the collection of the draft, the claimant was entitled to the proceeds thereof in the hands of the collecting agent.

Part of the opinion of the court is as follows:

> "The contention is, however, *that the practice shown of crediting sight drafts, when received for collection, as cash, and the allowance of interest on daily balances into which such credits had entered, alters the case.*
>
> * * * * * *
>
> But if paper is indorsed 'for collection for account of the depositor,' and then deposited, and

> credit given, a different case is presented. The mere fact that paper thus indorsed is credited by a bank to the depositor as cash and the privilege accorded to him of drawing against the credit may not, as it seems, be sufficient to vest the bank with title to such paper.
>
> * * * * * *
>
> It was a restrictive indorsement and it must be assumed that that form of indorsement was adopted for a well defined purpose.
>
> *It may well be doubted whether the legal effect of that form of indorsement can be controlled or modified by proof of a usage existing to credit such items as cash, and permit the credit so given to be drawn against;* it being conceded that in the present case neither of the depositors saw fit to avail themselves of such privilege." (Italics ours.)

To the same effect, see *First National Bank* v. *Armstrong* (C. C. S. D. Ohio) (1890), 42 Fed. 193, 196; *Clark, &c. Co.* v. *Americus National Bank* (D. C. S. D. Ga.) (1916), 230 Fed. 738, 740; *Peoples State Bank* v. *Miller* (Mich., 1915), 152 N. W. 257, 259.

In *Morse on Banks and Banking* (6th Edition), Sec. 583 (C) the author has this to say regarding the allowance of credit:

> "This is a mere gratuitous privilege allowed by the bank which does not ripen into a binding legal usage * * * but this habit of the banks is a pure favor, and if there be no distinct understanding to change the natural effect of such dealing, *its long continuance* gives no real right whatsoever to the depositor to demand its continuance, or its practice in any individual case, whenever the bank may for any arbitrary reason see fit to withhold that favor." (Italics ours.)

*Paton's Digest of Legal Opinions and Banking Law,* Section 2738 reads:

> "Restrictive indorsement to bank for credit to account of third person may be charged back if item not paid."

The foregoing authorities are ample support for the view expressed for the Circuit Court of Appeals by Judge Learned Hand, where he says (R-35):

> "* * * * * Not only were the items themselves at once credited but interest upon them as well from the time of their receipt. This too we think immaterial. The immediate credit of such paper is itself evidence of the creation of a debt from the bank to its depositor and on its face presupposes a purchase of the check. But such an entry will not control the form of the paper. We do not see that it adds anything of substance that interest has been credited. Such entries are not kept in suspense or entered 'short', but are reversed, if the item be dishonored.
>
> * * * * * *
>
> It appears to us that to make the added credit of interest so important is to deal in unrealities. When an account bears interest it is as natural to begin to credit interest at once as to credit the item at all. Any distinction seems to us gratuitous."

The Supreme Court of the United States has recognized that in cases of restrictive indorsements where a check is indorsed for collection the collecting bank has a dual duty —collecting and crediting.

> *American National Bank* v. *Miller* (1913) 229 U. S. 517.

In the present case Knauth, Nachod & Kuhne failed to perform the function of collecting.

It is quite evident that the allowance of interest in the case of individuals, assumes a very different degree of importance from interest in cases where banks are involved. For example in the case of *Upshur* v. *Briscoe* (1891), 138 U. S. 365, relied on by the plaintiff, there was an agreement between lawyer and his client, who apparently desired to have the lawyer administer the interest of a certain fund. The question presented was whether the arrangement was one of a fiduciary character which would survive the discharge in bankruptcy under the existing act. The court held that it was not a trust and that the discharge did in fact operate. The case has nothing to do with allowance of interest by banks and is not in any way appropriate to the case at bar.

The reason why the facts cited in the case at bar under the authorities quoted above are insufficient to overcome the clear meaning of written words is found in an observation of the Supreme Court in the case of *St. Louis & San Francisco Railway Co.* v. *Johnston* (1889), 133 U. S. 566, in which the court says:

> "Because the banks often let good customers overdraw, do the latter thereby get the right to do so when the banks deem it improper to permit it?"

The fact is here that the checks in question were credited on the books of K. N. & K., but nothing appears to show that Röchling had the right to demand that this be done. The fact is that an entry allowing interest from July 15th was similarly made, but no right to demand such an entry has been shown. And so on. And yet to override the writ-

ing on the checks it is necessary to say that a collection of facts, none of which individually amount to rights, do in the aggregate amount to a right hostile and superior to the written wording on the checks themselves.

It is submitted that on the facts of the case and under the authorities above quoted such a position cannot be maintained.

5. THE FACTS IN THE PRESENT CASE BRING IT WITHIN THE RULE OF *White* v. *The Bank* AND NOT WITHIN THE RULE OF *Burton* v. *The United States*.

The appellant seeks to restrain the respondents' right to recover by endeavoring to apply the rule laid down in *Burton* v. *The United States* (1904), 196 U. S. 283, the facts in which case are substantially as follows: The plaintiff received an out-of-town check drawn to his order. He indorsed it generally and deposited it with the Riggs Bank, where he maintained a regular checking account and where this check, as well as others when deposited, was credited immediately before its collection.

In the *Burton* case there are no words of restriction of any sort appearing on the check. In the case at bar not only the payee but the method of payment is specified.

Again in the *Burton* case the situation is that of a depositor dealing with his own bank, whereas in the case at bar a third person makes a deposit with Knauth, Nachod & Kuhne for the account of Röchling.

The absence of any restrictive wording goes to the very essence of the matter, for in the words of Chief Justice Gibson in *Overton* v. *Tyler* (1846), 3 Pa. Stat. 348,—

> "A negotiable bill or note is a courier without luggage, a memorandum to control it, though indorsed

upon it, would be incorporated with it, and destroy it".

The distinction between checks with and without restrictive wording was one with which Mr. Justice Peckham, who wrote the opinion in *Burton* v. *The United States,* must have been unusually familiar because it was he when a member of the Court of Appeals of New York who wrote the opinion in *National B. & B. Bank* v. *Hubbell, supra.*

But the question is not left to inference since in the *Burton* case, on page 303, the very point is made perfectly clear in a quotation cited by the court with approval from the case of *Taft* v. *The Bank* (1899), 172 Mass. 363, reading as follows:—

> "So when, without more, a *bank receives upon deposit a check indorsed without restriction,* and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale in which, as with money so deposited, the check becomes the absolute property of the banker". (Italics ours.)

The *Burton* case and the *White* case are parallel and complementary authorities that do not conflict. The one where the bank is a lender of money with simply a debt to repay to the depositor—that is the *Burton* case. The other (and perhaps the older historically) where the bank is to obtain or pay funds from or to some distant point, to conserve valuables, or to perform some definite task—that is the *White* case.

In the case at bar the words relating to payment through the Clearing House are additional factors that bring the case within the purview of the *White* decision. The use

of this wording indicates that the National Bank of Commerce and the National City Bank did desire that Knauth, Nachod & Kuhne should be agents to collect the checks of these institutions through the New York Clearing House since in so doing these two banks knew that they would then pay their own checks through the Clearing House to some member bank who, under the rules of that institution, would have to guarantee prior indorsements.

In our view the case at bar has no relation to such cases as *Hook* v. *Pratt* (1879), 78 N. Y. 371, which the appellant cites. In that case a draft on the Treasurer of the M Company, payable to the defendant's testator, was indorsed "Pay to the order of Mrs. H for the benefit of her son Charlie". An action was commenced on the note against the defendant, who resisted on the ground that the indorsement did not import a consideration. The court held that the indorsement did import a consideration and that in the nature of the indorsement the indorsee might negotiate the draft although the wording on the draft gave notice of the interest of beneficiary named. Applied to the case at bar it means that Knauth, Nachod & Kuhne could have sued the National City Bank had the latter refused to honor its check but in doing so Knauth, Nachod & Kuhne would nevertheless, by the terms of the indorsement, be acting on behalf of the beneficiary, whose names appear on the checks, to wit, the respondents. These kind of indorsements are described in *Paton's Digest of Legal Opinions and Banking Law,* Section 2735, as being "not title conveying but merely agent creating and restrictive"

The difficulties that the appellant seeks to raise in opposition to this course are ones that have been repeatedly and unsuccessfully brought forward before, and in the case of

*First National Bank of Belmont* v. *First National Bank* (1898), 58 Ohio State 207, there is an interesting summary showing the consistency of the decisions of the courts in matters of restrictive indorsement despite the objections of custom, particular circumstances and hardships unsuccessfully urged.

To hold that by the terms of the check in this case Knauth, Nachod & Kuhne could not and did not obtain title thereto unless and until the proceeds had been collected in accordance with the instructions thereon, is to give full force and effect to such instructions and to follow the interpretations of repeated decisions holding that the words employed are restrictive in force. Such a decision makes for that uniformity that courts seek to reach in matters affecting negotiable paper.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

HENRY G. HOTCHKISS,
Counsel for Respondents.

WILLIAM H. WHITE, JR.,
HENRY G. HOTCHKISS,
Of Counsel.